



STATE OF NEW JERSEY

In the Matter of Omar Diaz, Newark

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2023-856

Enforcement

ISSUED: November 23, 2022 (SLK)

Omar Diaz, a Police Captain with Newark, represented by John J. Chrystal, III, President, Superior Officers' Association, requests enforcement of *In the Matter of Omar Diaz* (CSC, decided September 21, 2022).

By way of background, on June 25, 2022, Newark issued Diaz a Preliminary Notice of Disciplinary Action (PNDA) immediately suspending him without pay effective that same day, and indicating that Diaz was charged with Driving While Intoxicated and he violated various departmental rules and regulations. It specified that on June 25, 2022, Diaz was working outside employment when a Police Sergeant noticed that Diaz appeared intoxicated. Thereafter, Newark presented that Diaz failed a field sobriety test. Additionally, Newark held a limited purpose hearing on July 18, 2022, where a determination was made to continue his immediate suspension without pay. Subsequently, Newark issued a "Final Notice of Disciplinary Action¹" (FNDA) continuing Diaz's suspension without pay.

In *In the Matter of Omar Diaz* (CSC, decided September 21, 2022), the Civil Service Commission (Commission) noted that Diaz's immediate suspension under *N.J.A.C. 4A:2-2.5(a)1* was warranted as the charges of driving while intoxicated established a hazard and his immediate suspension was necessary to maintain the

¹ As the continuation of Diaz's suspension was not a final disciplinary action, Newark's notice was not a FNDA, despite this notice being issued on a FNDA form.

health, order, and effective direction of the police department. However, it noted that Diaz was indefinitely suspended without being charged with a crime as a motor vehicle law, while serious, is not considered a violation of a criminal law. *See In the Matter of Louis Ricca* (CSC, decided December 4, 2013). Further, pursuant to *N.J.A.C. 4A:2-2.5(a)1*, *N.J.A.C. 4A:2-2.5(d)* and *N.J.A.C. 4A:2-2.6(d)*, an immediate suspension can only generally span 55 days from its inception, allowing for the maximum time for the departmental hearing process to be completed. Accordingly, the Commission ordered that Diaz's immediate suspension beginning on June 25, 2022, shall be considered without pay through August 19, 2022, and thereafter with pay until he was either reinstated or a departmental hearing on the merits was held and the disposition of a new FNDA sustaining the charges was issued. Further, the appointing authority was to provide Diaz back pay from August 20, 2022, until his reinstatement or issuance of a new FNDA.

In his request, Diaz presents that although he was reinstated on September 26, 2022, he has not received back pay. Therefore, he is requesting that the appointing authority comply with the Commission's order and be directed to give back pay immediately for the period from August 20, 2022, through September 25, 2022, and any other relief the Commission deems fair, equitable, and just.

In response, the appointing authority, represented by France Casseus, Assistant Corporation Counsel, asserts that Diaz has misrepresented that it failed to comply with the Commission's order. It states that back pay is subject to mitigation and, therefore, a mitigation form was sent to Diaz to complete for processing payment. Further, in response to Diaz checking on his payment status, the appointing authority advised that it had not received the mitigation form from him. It presents that the next day, Diaz sent the mitigation form and filed the subject enforcement action. The appointing authority asserts that at no point was it unresponsive and the delay was due to waiting for Diaz to submit the mitigation form. It indicates that the mitigation form is still incomplete because he did not sign and certify the form, he did not provide proofs regarding the unemployment amounts he received, and he did not clearly indicate whether he received unemployment from the date the Commission issued its decision, September 21, 2022, through September 25, 2022, which was the day before his reinstatement. Therefore, the appointing authority requests that Diaz fully complete the mitigation form and provide proof of the unemployment amount up and until his return to work so that back pay can be processed. It submits the mitigation form that Diaz submitted and email communications between the parties to demonstrate that Diaz has not provided complete information and it has not been unresponsive.

In reply, Diaz presents that he provided his unemployment benefits award between August 20, 2022 to September 26, 2022, the back pay period. He states that he attempted to settle this matter by providing the amount of unemployment that he received during the August 20, 2022, to September 20, 2022 period. He claims that

the appointing authority's mitigation form was overly broad and he filled out the form with the unemployment amount received. In the mitigation form, Diaz certified that he received \$3,216, based on a weekly amount of \$804, for unemployment benefits between August 20, 2022 and September 20, 2022. He also indicated that he did not earn any income or receive any other loss of wages benefits during this period.

CONCLUSION

N.J.A.C. 4A:2-2.10(d) provides, in pertinent part, that back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. Benefits shall include vacation and sick leave credits and additional amounts expended by the employee to maintain his or her health insurance coverage during the period of improper suspension or removal.

1. Back pay shall not include items such as overtime pay, holiday premium pay and retroactive clothing, uniform or equipment allowances for periods in which the employee was not working.
2. The award of back pay shall be reduced by the amount of taxes, social security payments, dues, pension payments, and any other sums normally withheld.
3. Where a removal or suspension has been reversed or modified, an indefinite suspension pending the disposition of criminal charges has been reversed, the award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4 below.

* * *

5. An employee shall not be required to mitigate back pay for any period between the issue date of a Civil Service Commission decision reversing or modifying a removal or reversing an indefinite suspension and the date of actual reinstatement. The award of back pay for this time period shall be reduced only by the amount of money that was actually earned during that period, including any unemployment insurance benefits received.

N.J.A.C. 4A:2-2.10(e) provides that unless otherwise ordered, an award of back pay, benefits and seniority shall be calculated from the effective date of the appointing authority's improper action to the date of the employee's actual reinstatement to the payroll.

N.J.A.C. 4A:2-2.10(f) provides that when the Commission awards back pay and benefits, determination of the actual amounts shall be settled by the parties whenever possible.

In this matter, regarding Diaz's request to find that the appointing authority was in non-compliance with the Commission's September 21, 2022, decision, the record indicates that Diaz was reinstated to his position on September 26, 2022, which is only five days after the decision. Further, the record indicates that the appointing authority was in communication with Diaz attempting to resolve Diaz's back pay award. Therefore, there is nothing in the record that indicates that the appointing authority was in non-compliance with the Commission's order.

The record indicates that the appellant was awarded mitigated back pay from August 20, 2022, the effective date of the appointing authority's improper action, to September 20, 2022. Further, the appellant was awarded back pay from September 21, 2022, the date of the Commission's decision modifying Diaz's indefinite suspension, to September 25, 2022, the day before his reinstatement, which was only to be reduced by the amount of money that was actually earned during that period, including any unemployment insurance benefits received.

Concerning Diaz's unemployment benefits, the record is unclear. On appeal, Diaz indicates that he provided the appointing authority with the amount of unemployment received from August 20, 2022, to September 26, 2022. However, the mitigation form that he submitted indicated that he received \$3,216 for unemployment benefits from August 20, 2022, to September 20, 2022. Moreover, it is noted that the actual back pay award period is August 20, 2022, to September 25, 2022, as he was reinstated on September 26, 2022. Therefore, Diaz shall clearly provide to the appointing authority the amount of unemployment received from August 20, 2022, to September 20, 2022, the mitigation period, and from September 21, 2022 to September 25, 2022, the non-mitigation period.

ORDER

Therefore, it is ordered that this request be denied. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of unemployment earned, as described herein, shall be submitted by or on behalf of Diaz to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute to the amount of back pay.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF NOVEMBER, 2022

Deirdre L. Webster Cobb

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